No. 9681

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 207,

Appellant,

vs.

Walter P. Spreckels, individually, and as Regional Director, 21st Region, of the National Labor Relations Board,

Appellee.

APPELLANT'S OPENING BRIEF.

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TOPICAL INDEX.

PAGE

Statement of the case.......... 1

Statement of facts and pleadings disclosing basis of jurisdiction.... 2

A. Basis of jurisdiction of the District Court.......... 4

B. Jurisdiction of the Circuit Court of Appeals to review the decision in question 4

Questions involved 5

Outline of the argument.......... 6

I.

Plaintiff, although an unincorporated labor association, has the right to maintain suits in the Federal Courts.......... 7

II.

An officer of the United States Government, who Acts outside and beyond the scope of his authority, can be enjoined.......... 8

III.

A suit against an officer, under the conditions stated in Point II, is not a suit against the United States or a governmental agency 12

IV.

An officer of the Board has no power, under the National Labor Relations Act, to do acts interfering with validly existing contracts, either by acts colore officio, or by acts entirely outside any power of his office.......... 15

V.

Defendant's acts being outside the scope of the authority conferred upon him by statute, the review provisions of the statute are inapplicable 21

PAGE

VI.

The District Courts of the United States have general jurisdiction to enjoin the board, or its officers, from committing acts unauthorized by the National Labor Relations Act........................ 24

VII.

A suit against a subordinate officer of the board to enjoin him from doing acts not authorized by statute is not in effect a suit against the board. Such board is not an indispensible party defendant, because the doctrine of Respondeat Superior does not apply to subordinate agents of the Government.................... 27

Conclusion 28

INDEX TO APPENDIX.

PAGE

Excerpts from National Labor Relations Act. (49 Stats 449).... 1

Section 8 1

Section 9 2

Representatives and elections.. 3

Prevention of unfair labor practices.. 3

Section 10 3

TABLE OF AUTHORITIES CITED.

Cases — PAGE

Aircraft Workers' Union v. Nylander, et al., 30 Fed. Supp. 993.... 26

Alston v. School Board City of Norfolk (C. C. A. 4, 1940), 112 Fed. (2d) 992 7

American Federation of Labor v. National Labor Relations Board, 84 L. Ed. 253 24

American Federation of Labor v. National Labor Relations Board, 308 U. S. 400; 84 L. Ed. 347.... 21

American West-African Line, Inc., 4 N. L. R. B. 1086.... 17

Baisley v. Henry, 55 Cal. App. 760; 204 Pac. 399.... 27

Bethlehem Shipbuilding Corp. v. Nylander, 14 Fed. Supp. 201.... 25

Colorado v. Toll, Superintendent of Rocky Mountain Park, 268 U. S. 228; 45 S. C. 505; 69 L. Ed. 927....9, 27

Franklin Union v. People, 220 Ill. 355; 77 N. E. 176; 4 L. R. A. (n. s.) 1001 7

Fresno National Bank v. Hawkins, 93 Cal. 551; 29 Pac. 233.... 27

Gonzales v. Williams, 192 U. S. 1, 24 S. Ct. 177; 48 L. Ed. 317 20

Hilton v. Oliver, 204 Cal. 535; 269 Pac. 425.... 27

Inter-Association of Machinists v. National Labor Relations Board, 85 L. Ed. 5.... 20

Kansas Home Ins. Co. v. Wilder, 43 Kan. 731; 23 Pac. 1061.... 20

Malone Aluminum Corp., Inc., 19 N. L. R. B. No. 52.... 17

Michel v. Smith, 188 Cal. 199; 205 Pac. 113.... 27

New England Transportation Co., 1 N. L. R. B. 130.... 17

Ng Fung Ho v. White, 249 U. S. 276, 42 S. Ct. 492; 66 L. Ed. 938 20

Noack v. Zellerbach, 11 Cal. App. (2d) 186; 53 Pac. (2d) 986.... 28

Noble, Secretary of the Interior, v. Union River Logging Co., 147 U. S. 165, 13 S. C. 271, 37 L. Ed. 123.... 9

PAGE

Philadelphia Co. v. Stimson, Secretary of War, 223 U. S. 605; 32 S. C. 340; 56 L. Ed. 570....9, 12

United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344; 42 S. C. 570; 66 L. Ed. 975; 27 A. L. R. 762.... 7

United States v. Tod, 263 U. S. 149; 44 S. Ct. 54; 68 L. Ed. 221 20

Waite v. Macy, 246 U. S. 606; 38 S. C. 395; 62 L. Ed. 892.... 8

Work, Secretary of Interior, v. Louisiana, 269 U. S. 250, 46 S. C. 92, 70 L. Ed. 259 14

Statutes.

Federal Rules of Civil Procedure, Rule 17(b).... 7

National Labor Relations Act, Sec. 8.... 20

National Labor Relations Act, Sec. 9c.... 19

National Labor Relations Act, Sec. 10....20, 21, 23

United States Code Annotated, Title 28, Para. 225(a), Subd. (1) 4

United States Code Annotated, Title 28, Sec. 41, Subd. 8.... 4

United States Code Annotated, Title 28, Sec. 41, Subsec. (1).... 4

United States Code Annotated, Title 28, Sec. 345.... 4

Textbooks.

4 American Jurisprudence, Associations, Par. 50.... 7

27 American Law Reports, 790.... 7

98 American Law Reports, 411.... 20

Joseph Rosenfarb, "The National Labor Policy," pp. 267-268.... 18

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Appellant,

vs.

WALTER P. SPRECKELS, individually, and as Regional Director, 21st Region, of the National Labor Relations Board,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of the Case.

This is an appeal from a decree of the United States District Court, Southern District of California, Central Division, dismissing plaintiff's complaint for an injunction. The reasons of the court for its action are recited in its decision [R. 56] and decree [R. 57]. All of these reasons center around the proposition that the trial court had no jurisdiction over the cause.

Statement of Facts and Pleadings Disclosing Basis of Jurisdiction.

The pleadings show plaintiff to be a labor organization affiliated with the American Federation of Labor. The defendant is sued both individually and in his official capacity as Regional Director of the 21st Region of the National Labor Relations Board (hereinafter referred to as the Board) [R. 3]. The allegations are in substance as follows:

In October, 1938, plaintiff was certified as the exclusive bargaining agent for the employees of the Cudahy Packing Company (hereinafter referred to as the Employer). This certification was in consequence of a consent election held under the auspices of the National Labor Relations Board. Pursuant to this election and certification, plaintiff made a contract with the employer. A renewal of it was in effect at the time the acts alleged in the complaint were committed. It was in effect also when the complaint was filed, and [containing an automatic renewal provision, R. 16] it is in effect now.

This existing contract, it is alleged, was wrongfully interfered with by the defendant Spreckels [R. 3]. It is stated that the defendant Spreckels purported to act as regional director of the National Labor Relations Board, but in fact acted in excess of his authority as regional director. The acts committed by him, according to the complaint, fall into several classes.

First: He wrongfully intimidated the employer and the employees from living up to the contract, which the complaint alleges was in force;

Second: He wrongfully notified the employees and the employer in effect that the contract between the plaintiff and the employer was void, bringing about this effect:

(a) By publishing notices of purported hearings before the regional office of the Labor Board;

(b) By publishing notices of a purported election;

(c) By authorizing and encouraging Harry Bridges and the C. I. O. to declare to the employees of the plant that the existing contract was void, and that the National Labor Relations Board and the defendant Spreckels would select an exclusive bargaining agent for the employees;

Third: He made representations to the National Labor Relations Board, pursuant to which that Board took steps in violation of plaintiff's contract rights, and ordered an election, and made statements notifying the employees that the plaintiff was not the legally constituted bargaining agent [R. 5];

Fourth: He encouraged and urged the rival union, after March 14, 1940, while plaintiff's contract with the employer was still in force and effect, to negotiate a new contract.

All of these acts, it is alleged, were done with the intent of causing plaintiff to lose members, dues and prestige, and compelling the plaintiff to resort to legal action, and to expend sums of money. It is further stated that these acts did cause loss of members, dues and prestige and the expense of attorney's fees, and will continue to cause such detriments, for all of which there is no plain, speedy or adequate remedy at law [R. 7].

A. Basis of Jurisdiction of the District Court.

The questions raised by this state of facts can be resolved only by an interpretation of the scope of the National Labor Relations Act, and the authority vested by virtue of that act in a subordinate officer of the National Labor Relations Board. Therefore, the controversy—irrespective of the amount involved—falls within the provision of *United States Code Annotated,* Title 28, Section 41, Subdivision 8, which reads:

> "The District Court shall have original jurisdiction as follows:
>
> . . . .
>
> (8) Of all suits and proceedings arising under any law regulating commerce."

A possible alternative ground for jurisdiction that would have been available to plaintiff if the complaint had not been dismissed is that a Federal question is involved. *U. S. C. A.*, Title 28, Sec. 41, Subsec. (1). The complaint in question does not state a jurisdictional amount, but it is plain from the allegations of the complaint, and from the number of members involved and affected, that the requisite jurisdictional amount could have been made to appear.

B. Jurisdiction of the Circuit Court of Appeals to Review the Decision in Question.

This Honorable Circuit Court has jurisdiction to review the judgment under United States Code Annotated, Title 28, Paragraph 225(a), Subdivision (1), for the reason that the decision of the District Court is a final decision of the District Court, not subject to a direct review in the Supreme Court of the United States, under Section 345 of Title 28.

Questions Involved.

The basic question is: Does either an officer, purporting to act for and on behalf of, or under the direction of the National Labor Relations Board, or an individual by color of such office, have the authority under the National Labor Relations Act to do any acts tending to abrogate an existing and valid contract between a labor union and an employer, if that labor union has been previously certified by the National Labor Relations Board to be the properly constituted bargaining agent for the employees, and if the contract made pursuant to such certification is in force and effect, and where there is no claim that either the contract or the election itself are the result of unfair labor practices?

The subsidiary questions arising out of the main problem are:

1. May an officer of the Board be enjoined from committing *ultra vires* acts, or is he, if he acts under the immediate direction or supervision of the Board, free from injunctive process, even though both he and the Board have no authority under the statute to do the acts complained of?

2. Can the court enjoin an agent of the Board from doing acts outside of the scope of his office or authority?

3. Where an agent of the Board lacks statutory power and jurisdiction to do the acts complained of, and where there is not involved an erroneous decision of the agent within his existing or conceded jurisdiction, must the plaintiff pursue the administrative remedies provided by the Act, and if there are none covering his case can he find relief in a court of equity upon a showing of irreparable injury?

Outline of the Argument.

In the ensuing argument we shall discuss the following points in the order stated:

(1) Plaintiff, although an unincorporated labor association, has the right to maintain suits in the Federal Courts;

(2) An officer of the United States government, who acts outside and beyond the scope of his authority, can be enjoined;

(3) A suit against an officer, under the conditions stated in point (2) is not a suit against the United States or a governmental agency;

(4) An officer of the Board has no power, under the National Labor Relations Act, to do acts interfering with validly existing contracts, either by acts *colore officio,* or by acts entirely outside any power of his office;

(5) Defendant's acts being outside the scope of the authority conferred upon him by statute, the review provisions of the statute are inapplicable;

(6) The District Courts of the United States have general jurisdiction to enjoin the Board, or its officers, from committing acts unauthorized by the National Labor Relations Act;

(7) A suit against a subordinate officer of the Board to enjoin him from doing acts not authorized by statute is not in effect a suit against the Board. Such Board is not an indispensible party defendant, because the doctrine of *respondeat superior* does not apply to subordinate agents of the government.

I.

Plaintiff, Although an Unincorporated Labor Association, Has the Right to Maintain Suits in the Federal Courts.

(1) The plaintiff, a labor union, though an unincorporated association, may be sued and sue in its own name.

Rule 17(b), *Federal Rules of Civil Procedure;*

United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344; 42 S. C. 570; 66 L. Ed. 975; 27 A. L. R. 762;

Alston v. School Board City of Norfolk (C. C. A. 4, 1940), 112 Fed. (2d) 992.

(2) The failure on the part of defendant to raise an objection to plaintiff's capacity to sue in the trial court constitutes a waiver of any objection of plaintiff's capacity, and the objection may not be raised for the first time on appeal.

4 *Amer. Jur.,* Associations, par. 50;

27 *A. L. R.* 790;

Franklin Union v. People, 220 Ill. 355; 77 N. E. 176; 4 L. R. A. (n. s.) 1001.

II.

An Officer of the United States Government, Who Acts Outside and Beyond the Scope of His Authority, Can Be Enjoined.

There is unimpeachable authority to the effect that if the statute authorizes an officer of the government or a governmental board, to do certain acts, the authority and power of such officer or board is measured by the language of the Act, and any attempt to do acts not authorized by the Act in question constitutes a violation of official duty, and places the officer in a position where the law considers his unauthorized acts as those of an individual rather than those of an officer of the government. In such cases, and under such conditions, the unauthorized act of the officer, if it interferes with the rights and property of citizens will be enjoined by courts of equity.

Waite v. Macy, 246 U. S. 606; 38 S. C. 395; 62 L. Ed. 892, 895:

> "The Secretary and the board must keep within the statute (Merritt v. Welsh, 104 U. S. 694, 26 L. ed. 896), which goes to their jurisdiction (see Interstate Commerce Commission v. Northern P. R. Co., 216 U. S. 538, 544, 54 L. ed. 608, 609, 30 Sup. Ct. Rep. 417), and we see no reason why the restriction, should not be enforced by injunction, as it was, for instance, in Bacon v. Rutland R. Co., 232 U. S. 134, 58 L. ed. 538, 34 Sup. Ct. Rep. 283; Philadelphia Co. v. Stimson, 223 U. S. 605, 620, 56 L. ed. 570, 576, 32 Sup. Ct. Rep. 340; Santa Fe P. R. Co.

v. Lane, 244 U. S. 492, 61 L. ed. 1275, 37 Sup. Ct. Rep. 714. We are satisfied that no other remedy, if there is any other, will secure the plaintiff's rights."

Philadelphia Co. v. Stimson, Secretary of War, 223 U. S. 605; 32 S. C. 340; 56 L. Ed. 570.

Colorado v. Toll, Superintendent of Rocky Mountain Park, 268 U. S. 228; 45 S. C. 505; 69 L. Ed. 927, 929:

"The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do, and that derogate from the quasi sovereign authority of the state. There is no question that a bill in equity is a proper remedy, and that it may be pursued against the defendant without joining either his superior officers or the United States. Missouri v. Holland, 252 U. S. 416, 431, 64 L. ed. 641, 646, 11 A. L. R. 984, 40 Sup. Ct. Rep. 382; Philadelphia Co v. Stimson, 223 U. S. 605, 619, 620; 56 L. ed. 570, 576, 577; 32 Sup. Ct. Rep. 340."

Noble, Secretary of the Interior v. Union River Logging Co., 147 U. S. 165, 13 S. C. 271, 37 L. Ed. 123, 127. This case arose under a bill of equity by the Union River Logging Company to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from executing a certain order revoking the approval of the plaintiff's map for a right of way over public lands, and from molesting plaintiff in the enjoyment of such right of way secured to it under an Act of Congress.

The court, after considering the matter, ordered a decree for the plaintiff. An injunction as prayed for in the

bill was issued against the officer. Upon appeal it was held that since the Secretary of the Interior had no power to revoke the act of his predecessor, the injunction was properly issued. The court said at page 127:

> "The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided, and his approval was noted upon the plats, the first section of the Act vested the right of way in the railroad company. The language of that section is 'that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or territory,' etc. The uniform rule of this court has been that such an Act was a grant *in praesenti* of lands to be thereafter identified. Denver & R. G. R. Co. v. Alling, 99 U. S. 463. (25; 438). The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. Moffat v. United States, 112 U. S. 24 (28; 623); United States v. Minor, 114 U. S. 233 (29: 110). A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without

due process of law, and was, therefore, void. As was said by Mr. Justice Grier, in United States v. Stone, 69 U. S. 2 Wall. 525, 535 (17: 765, 767): 'One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of the court.' Moore v. Robbins, 96 U. S. 530 (24: 848). The case of United States v. Schurz, 102 U. S. 378 (26: 167) is full authority for the position assumed by the plaintiff in the case at bar. In this case the relator had been adjudged to be entitled to 160 acres of public lands; that patent had been regularly signed, sealed, countersigned and recorded; and it was held that a mandamus to the Secretary of the Interior to deliver the patent to the relator should be granted. It was said in this case by Mr. Justice Miller: 'Whenever this takes place' (that is, when a patent is duly executed) 'the land has ceased to be the land of the government, or, to speak in technical language, title has passed from the government, and the power of these officers to deal with it has also passed away.'

"It was not competent for the Secretary of the Interior thus to revoke the action or his predecessor, and the decree of the court below must, therefore, be affirmed".

These authorities show that an invalid and unauthorized act of a government officer can be enjoined.

III.

A Suit Against an Officer, Under the Conditions Stated in Point II, Is Not a Suit Against the United States or a Governmental Agency.

The cases already cited, and others of similar import, hold that a suit to enjoin an officer of the United States from doing acts unauthorized by the statutes pertaining to his office is not a suit against the United States, and therefore its consent to the suit is not required.

This was expressly so stated by Mr. Justice Hughes in *Philadelphia Company v. Stimson, Secretary of War,* 223 U. S. 605, 32 S. C. 340, 56 L. Ed. 570, 576:

> "First: If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property have been wrongfully invaded. Little v. Barreme, 2 Cranch, 170; United States v. Lee, 106 U. S. 196, 220, 221, 27 L. ed. 171, 181, 182, 1 Sup. Ct. Rep. 240; Balknap v. Schild, 161 U. S. 10, 18, 40 L. ed. 599, 601, 16 Sup. Ct. Rep. 443; Tindal v. Wesley, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; Scranton v. Wheeler, 179 U. S. 141, 152, 45 L. ed. 126, 133, 21 Sup. Ct. Rep. 48. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been ap-

plied with respect to state officers seeking to enforce unconstitutional enactments. Osborn v. Bank of United States, 9 Wheat. 738, 843, 868, 6 L. ed. 204, 229, 235; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Pennover v. McCannaughty, 140 U. S. 1, 10, 35 L. ed. 363, 365, 11 Sup. Ct. Rep. 499; Scott v. Donald, 165 U. S. 107, 112, 41 L. ed. 648, 653, 17 Sup. Ct. Rep. 262; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Ex parte* Young, 209 U. S. 123, 159 160, 52 L. Ed. 714, 728, 729, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 A & E Ann. Cas. 764; Ludwig v. Western U. Teleg. Co., 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Herndon v. Chicago R. I. & P. R .Co., 218 U. S. 135, 155, 54 L. Ed. 970, 976, 30 Sup. Ct. Rep. 633; Hopkins v. Clemson Agri. College, 221 U. S. 636, 643-645, 55 L. ed. 890, 894, 895, 35 L. R. A. (N. S.) 243, 31 Sup. Ct. Rep. 654. And it is equally applicable to a Federal Officer acting in excess of his authority or under an authority not validly conferred. Noble v. Union River Logging R. Co., 147 U. S. 165, 171, 172, 37 L. Ed. 123, 125, 126, 13 Sup. Ct. Rep. 271; American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33.

"The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

The same holding is found in *Work, Secretary of Interior v. Louisiana,* 269 U. S. 250, 46 S. C. 92, 70 L. Ed. 259, 263:

> "It is clear that if this order exceeds the authority conferred upon the Secretary by law and is an illegal act done under color of his office, he may be enjoined from carrying it into effect. Noble v. Union River Logging R. Co., 147 U. S. 165, 171, 172, 37 L. ed. 123, 125, 126, 13 Sup. Ct. Rep. 271; Garfield v. United States, 211 U. S. 249, 261, 262, 53 L. ed. 168, 174, 175, 29 Sup. Ct. Rep. 62; Lane v. Watts, 234 U. S. 525, 540, 58 L. ed. 1440, 1456, 34 Sup. Ct. Rep. 965; Payne v. Central P. R. Co., 255 U. S. 228, 238, 65 L. ed. 598, 603, 41 Sup. Ct. Rep. 314; Santa Fe P. R Co.. v. Fall, 259 U. S. 197, 199, 66 L. ed. 896, 897, 42 Sup. Ct. Rep. 466; Colorado v. Toll, 268 U. S. 228, 230, 69 L. ed. 927, 929, 45 Sup. Ct. Rep. 505. A suit for such purposes is not one against the United States, even though it still retains the legal title to the lands, and it is not indispensable party. Garfield v. United States, 211 U. S. 260, 262, 53 L. ed. 174, 29 Sup. Ct. Rep. 62; Lane v. Watts, 234 U. S. 540, 58 L. ed. 1456, 34 Sup. Ct. Rep. 965."

IV.

An Officer of the Board Has No Power, Under the National Labor Relations Act, to Do Acts Interfering With Validly Existing Contracts, Either by Acts Colore Officio, or by Acts Entirely Outside Any Power of His Office.

The defendant Spreckels has no power, either by color of his office as a subordinate of the Board, or as an individual, to interfere with or to seek to abrogate the existing contract between the plaintiff and the employer.

The complaint alleges two types of acts of interference on the part of the defendant.

The first type of acts embraces the extra-jurisdictional statements, encouragements and proddings by the defendant Spreckels and his agents and employees suggesting to the C. I. O. and to Harry Bridges, to treat the existing contract as void, and to negotiate a new one.

The other type of acts consist of the wrongful use of the machinery set up by the National Labor Relations Act, to interfere with or defeat the existing contract of the plaintiff.

(1) As to the first type of acts, it is plain that the National Labor Relations Act nowhere authorizes either the Board, or an officer thereof, to encourage or favor one labor organization over the other, to express an opinion on the validity of existing contracts, or to invite or suggest action in conformance with the defendant's individual preference of organizations. Nor may he, while the purported decision of the Board presumes, without deciding, that the agreement of October 24, 1939, constitutes a contract [R. 38] state that it is void in his opinion, and should

be replaced by a new one which the C. I. O. should negotiate at once.

If, by way of example, a judicial officer assumed in a judicial proceeding, without deciding, that a certain document was valid, and if he then got in touch with an interested party and suggested that in his opinion the document was void and a new one should be negotiated, we would find such conduct highly reprehensible. In fact, it is almost inconceivable that this should occur at all. While there may be some question as to a litigant's right to enjoin the judge in that event, similar reasons of policy do not prevent a suit against an administrative officer who, as we have seen, can clearly be enjoined, if he acts outside of the scope of his authority.

(2) With respect to the second type of acts plaintiff does not urge that the mere existence of a contract presents, abstractly, a bar to an election or to certification proceedings It appears that the courts have not yet stated whether an election can be held while an honest contract is in effect.

If that power exists at all, there must be a *bona fide* election. The proceedings cannot be made to serve the purpose of undermining the existing honest contract. Proceedings under Section 9c* cannot be resorted to for the purpose of emasculating the force of the contract or of causing the collapse of the previously certified bargaining unit that made it.

That the motive of the defendant in causing the machinery of the act to be set in motion was exactly that of choking off the life of the contract is, in substance, but

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*Pertinent provisions of the Act are set out in the Appendix hereto.

nevertheless plainly, alleged. That these allegations are not idle fancy appears from a comparison of the policy of the Board in general on such matters with the result of these purported proceedings.

While the Board has held that the existence of a contract cannot prevent the exercise of its power to conduct certification proceedings,

> *American West-African Line, Inc.*, 4 N. L. R. B. 1086;
>
> *Malone Aluminum Corp. Inc.*, 19 N. L. R. B. No. 52,

it has also plainly stated that *in spite of certification proceedings an existing contract continues unabated.* In *New England Transportation Co.*, 1 N. L. R. B. 130, it is said:

> "The whole process of collective bargaining and unrestricted choice of representatives assumes the freedom of the employees to change their representatives, *while at the same time continuing the existing agreements under which the representatives must function.* The National Mediation Board has clearly stated this principle in the following words:
>
> "(2) Change of representatives under existing agreements.—Where there is an agreement in effect between carrier and its employees signed by one set of representatives and the employees choose new representatives who are certified by the Board, the Board has taken the position that *a change in representation does not alter or cancel any existing agreement made in behalf of the employees by these previous representatives.* The only effect of a certification by the Board is that the employees have chosen other agents to represent them in dealing with the management

under the existing agreement. If a change in the agreement is desired, the new representatives are required to give due notice of such desired change as provided by the agreement or by the Railway Labor Act. Conferences must then be held to agree in the changes exactly as if the original representatives had been continued." (Italics supplied.)

While this right of holding elections irrespective of existing contracts is claimed by the Board to be unlimited as long as there is a dispute concerning representation, it has been exercised only under a restricted set of conditions. They are summarized as follows by Joseph Rosenfarb, attorney for the Board, in his book "The National Labor Policy," pages 267-268:

"The general rule then, as modified by the factor of time, may be stated as follows: Where the unexpired duration of the agreement is short the board will not disturb the contractual relationship, but where the existing exclusive contract has a long time to run, it will not be a bar to a choice of representatives. What duration of the contract is or is not a bar to determination is a matter which may vary under the circumstances of each case.

"The Board has apparently come to adopt the rule that *it will not proceed with an investigation of representatives during the existence of a contract of a year's duration until the time when the contract is about to expire.* 'The duration of the contract,' said the Board in National Sugar Refining Co. of N. J., 'is not for such a long period as to be contrary to the purposes and policies of the Act.' The dissent of Edwin S. Smith is predicated upon the argument that the employees shall not be denied the right to change

their representatives where the last determination, in this case by a consent election, occurred more than a year before.

"One of the A. F. of L. proposals for amendment provides that:

"Change of membership in or of affiliation with or withdrawal from a labor organization should not impair the rights conferred by this Act on such exclusive bargaining agent until either (1) the term of any written contract made by it with an employer has expired or (2) one year from the date of execution of such contract (where the contract extends beyond one year) has elapsed, whichever is first reached. Such labor organization shall have an interest in its own right in said contract for said period.

"*This provision apparently seeks to enact into law the present position of the Board on the issue.*" (Italics supplied.)

These observations are not offered for the purpose of suggesting that under its declared policy the Board should not have acted the way it did. They are made in order to show that plaintiff has a substantial basis for its allegation that the mainsprings of this controversy were the extra-jurisdictional motives of the defendant.

This shows, then, that proceedings under Section 9c of the Act must stop short of any inference with valid and existing contracts.

Nor may the power of the Board under Section 9c be exercised in such a fashion as to nullify or abrogate such contract rights, since such conduct on the part of the administrative officer would violate the requirement of due process, not only for aiming at the cancellation of a contract under the guise of an election proceeding with-

out giving the parties affected any notice of the true purpose of the alleged official action, but also because *unfairness of administrative officers in the performance of their administrative functions violates the due process clause.*

See Annotation in 98 A. L. R. 411.

This is not a case where a contract between the employer and the bargaining unit has come about by unfair labor practices. In such an event interference by the Board with the purported contract falls under the head of prevention of unfair labor practices. Proceedings of such a nature are authorized under Section 10 of the Act. By reason of the fact that Section 10 refers back to Section 8, such proceedings are directed exclusively against employers. Incident to Board proceedings a contract obtained by unfair labor practices can be ordered to be cancelled. This was recently determined in *Inter-Association of Machinists v. National Labor Relations Board,* 85 L. Ed. 5.

We have been unable to find any case in which the Board has interferred with or nullified a collective bargaining agreement *except where the contract itself was the result of unfair labor practices.*

Since the acts of the administrative officer in our case were in excess of his statutory jurisdiction they are void.

> *Kansas Home Ins. Co. v. Wilder*, 43 Kan. 731; 23 Pac. 1061;
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> *Gonzales v. Williams*, 192 U. S. 1, 24 S. Ct. 177; 48 L. Ed. 317;
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> *Ng Fung Ho v. White,* 249 U. S. 276, 42 S. Ct. 492; 66 L. Ed. 938;
>
> *United States v. Tod,* 263 U. S. 149; 44 S. Ct. 54; 68 L. Ed. 221.

V.

Defendant's Acts Being Outside the Scope of the Authority Conferred Upon Him by Statute, the Review Provisions of the Statute Are Inapplicable.

The discussion so far has shown that the acts of the defendant are not within the powers conferred upon him or the Board by the National Labor Relations Act, and that they must therefore be considered as the acts of the defendant as an individual.

Now, the Act contains no provision for the review or prevention of acts by the Board or its officers outside the scope of their powers as conferred by the Act. The review procedure of Section 10 contemplates and requires an order of the Board. Only an order can be reviewed by appropriate proceedings, to wit, a petition for enforcement or review, as the case may be, to a United States Circuit Court of Appeals. It has been expressly held that the certification of an employee group as the legally constituted bargaining agent is not an order, and that, therefore, the certification cannot be reviewed.

> *American Federation of Labor v. National Labor Relations Board,* 308 U. S. 400; 84 L. Ed. 347.

Incidentally, this case suggests (84 L. Ed., at p. 354) that the court is not deciding whether the action of the Board in certifying an employee unit as the properly constituted bargaining representative can be reviewed by independent suit. This question is expressly left open.

It can be readily seen that for a very grave injustice or injury resulting from the unwarranted interference with its contract under the guise of an election proceeding an employee unit such as the plaintiff, is entirely without administrative or other legal remedy. As already pointed out, a certification proceeding does not in and of itself result in an order. It is only after the employer refuses to bargain with the unit certified to it that the Board can issue an order of compliance. Not until then is there a subject for review by the Circuit Court of Appeals. It is conceivable, and in the instant case evident, that if the employer does not refuse to act pursuant to the certification in question, an order directing the employer to comply can never result. Therefore, there will never be an order with respect to which the review provisions of the National Labor Relations Act can be called into operation. The improperly ousted unit is simply helpless under the Act. That is why the remedy provided by the statute is inadequate. For that reason equity must step in and fill the gap, especially when the complaint is not directed against the certification proceeding as such but against defendant's unauthorized and unwarranted interference with plaintiff's contract which, according to the allegations of the complaint, is continuous.

There can be no question that the loss of prestige, loss of membership and inability to administer its trust to its members constitute an actual and irreparable injury to the plaintiff which cannot be properly measured in damages. In fact, the only element which can be approxi-

mated by figures is the amount of dues lost by the plaintiff because of the wrongful acts of the defendant, and the amount of expenses to which the plaintiff has been put by reason of the unlawful acts.

No other remedy except injunctive relief is effective or even available in this case. As the situation now stands, the employer will not do anything on which an order against it, under Section 10 of the Act, may be forthcoming.

If the employer refuses to continue to bargain with the plaintiff—which it in fact is doing—the plaintiff has no remedy under the Act which is effective, or which it can invoke, because the purported proceedings find that plaintiff is not a regularly constituted bargaining unit.

If the employer should refuse also to bargain with the C. I. O., which defendant says is the regularly constituted bargaining unit, an order might be issued under Section 10 against the employer. In that event this employer cannot say it is refusing to bargain with the C. I. O. because it still considers plaintiff the employee representative, since in fact it is also refusing to bargain with plaintiff. No review which may be had at the behest of the C. I. O. can possibly enure to the benefit of this plaintiff.

Therefore, plaintiff at this point is without any remedy whatsoever, unless equity intervenes.

VI.

The District Courts of the United States Have General Jurisdiction to Enjoin the Board, or Its Officers, From Committing Acts Unauthorized by the National Labor Relations Act.

There is no decision that appellant has been able to find which states that an officer of the National Labor Relations Board can be brought before the Circuit Court of Appeals under the review provisions of the National Labor Relations Act for exceeding the jurisdictional limitations of the Act.

As far as the defendant, as an individual, is concerned, and as far as his acts are those of an individual, the National Labor Relations Act, and its review provisions are utterly inapplicable.

The question whether official acts of the Board and its officers other than orders can be dealt with only by way of review in the Circuit Court of Appeals is still an open one. No decision can be found that an independent suit against the National Labor Relations Board, or its officers, is never possible or proper.

There have been on the contrary repeated pronouncements, dicta, it is true, on the part of the Federal Courts stating that a situation might be conceived where the ordinary equity powers of the Federal Courts could be invoked against the Board.

We call attention to the following opinions:

> *American Fed. of Labor v. National Labor Relations Board,* 84 L. Ed. 253, 259:
>
> "The Board argues that the provisions of the Wagner Act, particularly par. 9(d), have foreclosed review of its challenged action by independent suit

in the district court, such as was allowed under other acts providing for a limited court review in Chields v. Utah Idaho C. R. Co., 305 US 177, 83 L. ed. 111, 59 S. Ct. 160, and in Utah Fuel Co. v. National Bituminous Coal Commission, 306 US 56, 83 L. ed. 483, 59 S. Ct. 409; *cf.* Myers v. Bethlehem Shipbuilding Corp., 303 US 41, 82 L. ed. 638, 58 S. Ct. 459. But that question is not presented for decision by the record before us. Its answer involves a determination whether the Wagner Act, in so far as it has given legally enforceable rights, has deprived the district courts some portion of their original jurisdiction conferred by para. 24 of the Judicial Code, 28 USCA para. 41. It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy. This question can be properly and adequately considered only when it is brought to us for review upon a suitable record."

Bethlehem Shipbuilding Corp. v. Nylander, 14 Fed. Supp. 201, 204:

". . . and there can be no presumption that these men of standing are going to embarrass complainant by attempting to pry into complainant's trade secrets (they would be irrelevant to any issue) or do other and harmful and unnecessary acts. If they do actually attempt such, *this court is open for prompt preventive action.*" (Italics ours.)

Again, on page 208:

"I am not prepared to say, however, that circumstances might not arise in this case, or in any other case, under the subject-matter of the act, that would justify an application to the District Court for relief."

Also, on page 208, it is said:

"I therefore think that the District Court is open at all times with jurisdiction to try a case wherein imminent, irreparable injury is properly alleged as to subject-matter and as to parties defendant."

Northrop Corp. v. Madden, et al—also

Aircraft Workers' Union v. Nylander, et al. (U. S. Dist. Ct. S. D. California), 30 Fed. Supp. 993, 995:

"The fact that plaintiffs may fear that the ultimate action of the Board may result in harm to them does not warrant action before the harm becomes real.

"It is not the province of courts of equity to use the extraordinary remedy of injunction to allay a litigant's fears. They will interfere only in proper cases to prevent threatened infraction of rights. Neither complaint discloses grounds for such interference. Hence the conclusion already announced."

VII.

A Suit Against a Subordinate Officer of the Board to Enjoin Him From Doing Acts Not Authorized by Statute Is Not in Effect a Suit Against the Board. Such Board Is Not an Indispensible Party Defendant, Because the Doctrine of Respondeat Superior Does Not Apply to Subordinate Agents of the Government.

It was suggested in the District Court that the Board is an indispensible party to the action because the acts of Spreckels, as an officer of the Board, are in fact the acts of the Board.

Where wrongful and illegal acts are in question, that is, acts outside of the jurisdiction of the Board, it is not an indispensible, or even necessary, party. No principle is better settled in public law than that the doctrine of *respondeat superior* does not apply to the acts of subordinate public officers. If a subordinate officer commits a wrongful act for which he is amenable to the court, his superior is not responsible or liable. Therefore, clearly, he should not be joined in the action.

> *Colorado v. Toll*, 268 U. S. 228 (the pertinent portion has been quoted already under Point II).

Cases which hold that a principal is not liable for acts of his deputy out of the line of his official duty or beyond the power conferred upon him by virtue of his appointment are very numerous. We cite only the following cases from this jurisdiction:

> *Fresno National Bank v. Hawkins*, 93 Cal. 551; 29 Pac. 233;
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> *Michel v. Smith*, 188 Cal. 199; 205 Pac. 113;
>
> *Baisley v. Henry*, 55 Cal. App. 760; 204 Pac. 399;
>
> *Hilton v. Oliver*, 204 Cal. 535; 269 Pac. 425;

Noack v. Zellerbach, 11 Cal. App. (2d) 186; 53 Pac. (2d) 986.

The suit against the defendant Spreckels is therefore maintainable without joining the Board.

Conclusion.

This case presents a controversy of first impression. The action of the defendant, whether considered as purported official acts, or acts of an individual, are unauthorized under the National Labor Relations Act and void. All purported orders and utterances by the defendant are improper and void. Since they are not authorized by the National Labor Relations Act, the review provisions of the Act are not applicable. Therefore, this suit against the defendant is a suit for a wrong inflicted upon the plaintiff by the defendant in excess of his authority, and since plaintiff is without remedy under the National Labor Relations Act, its only recourse under the facts stated in the complaint is to a court of equity.

We respectfully submit that the District Court, as a court of equity, should have entertained this complaint, ascertained its merits, and entered judgment accordingly, rather than to dismiss the complaint on the erroneous assumption that it was without jurisdiction, and that the plaintiff was relegated to whatever review machinery the National Labor Relations Act provided.

Therefore, we respectfully urge that the judgment of the District Court should be reversed.

Respectfully submitted,

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APPENDIX.

Excerpts From National Labor Relations Act.
(49 Statutes 449.)

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding

under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not

less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice,

then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such tran-

script a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.